Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DANIEL MORRIS COLWELL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

1. Did the Supreme Court of Georgia err in holding, in disagreement with a number of state high courts and federal courts and at odds with *Faretta v. California*, 422 U.S. 806 (1975), that the trial court need not obtain a valid and constitutionally acceptable waiver of Petitioner's Sixth Amendment right to counsel when Petitioner proceeds with hybrid representation.

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CITATION TO THE OPINION BELOW

Petitioner pled guilty to felony murder and malice murder on April 23, 1998 after his competency trial. Petitioner was sentenced to death and in an order filed on October 15, 1998, the trial court imposed eight death sentences for the two malice murder convictions and the six felony murder convictions.

Petitioner's motion for new trial was denied on November 1, 1999. The Supreme Court of Georgia affirmed Petitioner's convictions and sentences of death on March 2, 2001. The opinion is filed as *Colwell v. State*, 273 Ga. 634, 544 S.E.2d 120 (2001), which is attached as an Appendix. Petitioner's motion for reconsideration was denied on April 5, 2001.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3), Petitioner having asserted below and now before this Court the deprivation of rights secured by the Sixth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States, which provide in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of

Counsel for his defense." U.S. Const., Amend. VI.

"No State shall . . . deprive any person of life [or] liberty . . . without due process of law . . . " U.S. Const., Amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner, Daniel Morris Colwell pled guilty and was sentenced to death by the Superior Court of Sumter County, Georgia for the capital murders of Judith and Mitchell Bell. The crimes occurred on July 20, 1996. The State filed its notice of intent to seek the death penalty on February 14, 1997. Petitioner filed a "Notice of Defendant's Insanity and Incompetence to Stand Trial" on September 12, 1997. Defendant was deteriorating rapidly and at a hearing conducted on November 20, 1997, both defense counsel and the District Attorney agreed that Petitioner had to be hospitalized for an extended period of time if there was any hope of his ever becoming competent to stand trial. Petitioner was hospitalized for close to a year.

A competency trial was held before a Sumter County jury beginning on April 20, 1998. The jury found the Petitioner competent to stand trial on April 23, 1999. Immediately after the jury found him competent, Petitioner pled guilty to two counts of malice murder, six counts of felony murder, two counts of aggravated assault, possession of a firearm by a convicted felon, possession of a firearm at a public gathering, and carrying a pistol without a license. A sentencing trial was

convened five months later and on October 13, 1998, a second jury fixed the penalty at death.

A motion for new trial, filed on November 12, 1998, and amended on July 7, 1999, was denied in an order filed on November 1, 1999. The Supreme Court of Georgia affirmed Petitioner's convictions and sentences of death on March 2, 2001. Petitioner's motion for reconsideration was denied on April 5, 2001.

STATEMENT OF FACTS

Petitioner has been treated throughout his adult life for mental illness, including schizophrenia. On July 22, 1996, Petitioner arrived at the parking lot of the busy Wal-Mart Super Center located east of Americus, Georgia. Several people were in the parking lot entering or leaving the store. Two of these customers were a couple, Mitchell Bell, 56, and his wife Judith Bell, 52.

As the Bells talked to a friend they noticed a large male come up behind Mitchell Bell. The man did not speak, but instead shot Mitchell Bell. Petitioner then shot Judith Bell. A Wal-Mart employee placed a 911 call.

Meanwhile, Petitioner had presented himself in the lobby of the Americus Police Department where Jessica Roy served as dispatcher and receptionist, working behind a glass booth facing the lobby of the police station. When things slowed down Roy asked if she could help the man. Petitioner stated he wanted to turn himself in. Officers arrived within seconds and learned the man in the lobby was Daniel Colwell.

Commander Nelson T. Brown of the Americus Police Department testified about the confession he took from Mr. Colwell. After being notified at his home by dispatcher Roy of the shootings Brown went to the Wal-Mart Super Center. There he was notified that Colwell, whom he knew well, had turned himself in.

Petitioner told Brown that he went to Wal-Mart with the plan to "commit murder." Defendant Colwell went on to say:

> I didn't know who I was going to plan on murdering. I was going to wait. I wanted to try to kill more than one person, because if you kill one person you'll just get life in prison, but if I killed two people, two or more people, they'll be more likely to give me the electric chair, so I was waiting on – I wanted to see a crowd of people so I can shoot more than one person.
>
> I was standing by my car and I seen this woman and her two children walking, and I said to myself – I was scared, because I didn't – you know, I ain't never killed nobody before, you know. I didn't know I was going to actually go through with it. I had to, you know, get my nerves up.
>
> * * *
>
> I seen – I seen some people somewhere else. I seen a crowd of other people, but they was a different color. I just wanted to make sure they was white so I'd be sure I'd get the electric chair, because, you know – you know, if you kill

> somebody black, they may ~~not~~ give me the electric chair for that. (SH 1710).[1]

After describing the shootings Petitioner told Brown he had wanted to commit suicide for five years "[b]ecause I'm bored with life" and had planned to do so Thursday night in the Skyland Motel "but I didn't have the nerve to pull the trigger to my head." He went on to say: after I couldn't pull the trigger, I say, "Well, I'll kill somebody to get the electric chair, and I didn't know when I was going to do it." (SH 1711).

Mr. Colwell concluded his statement to Commander Brown by saying:

> Well, I want to say this here. I'm not sick. I'm not insane. I viciously committed murder and deserve the electric chair. I'm not sick. I'm not insane. I just wanted to commit suicide. I wanted to die, and I think a way of dying is going to the electric chair. That'll end my life. I'm not sick, though, and I'm not insane, you know. (SH 1712).

Petitioner was found competent to stand trial. Immediately after Petitioner was found competent, the trial court informed Petitioner that he would control his defense and further told him that he could now go ahead and plead guilty. Petitioner proceeded to plead guilty.

After the jury found him competent, Petitioner stated that he wanted to represent himself. He pled guilty against his counsel's advice. The defense repeatedly urged the court to conduct a hearing on Petitioner's

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[1] "SH" refers to the sentencing hearing.

ability to control his own defense in light of *Faretta v. California*, 422 U.S. 806 (1975). The trial court denied the request and ruling from the bench, stated, "the jury found him competent, he was competent, he entered a plea of guilty, he does not wish to withdraw his guilty plea and I will allow it to stand." (Pre-trial hearing 112). The trial court repeatedly expressed its views that the defendant was better represented by counsel, however the trial court explained that Petitioner would have the ultimate authority over most matters in his case. The Court then stated "Well, let me tell you where I'm inclined at this point, which is where I think I was last time, is Mr. Colwell's been found to be competent and he's in control of his case, and you're his lawyers, and y'all will certainly use your best efforts to represent him, but he is in control of his case and has ultimate decision on most aspects of how the case will be done." (Pre-trial hearing 114).

At this point the trial court was once again urged to conduct a *Faretta* hearing. When the court indicated it was unfamiliar with *Faretta*, the defense provided the judge with a copy of the decision. Later, as the issue to hold a hearing is raised again, the court refers to the decision as "Farengtti." (Pre-trial hearing 112).

The court refused to have a hearing simply stating:

> I don't want Mr. Colwell to represent himself, although he may be capable of doing so. I would want you to continue, and I anticipate that y'all will continue as his counsel representing Mr. Colwell. However, I anticipate that Mr. Colwell will maintain his competency and will be capable of making an informed decision based upon the advice of counsel as to his rights and how he

> should proceed in this matter, but it is his decision. So that's where I anticipate continuing.

(Pre-trial hearing 120).

The above statement was the closest thing Petitioner had to a *Faretta* hearing. Throughout the competency trial and the sentencing trial, Petitioner and defense counsel were in fundamental disagreement whether Petitioner should receive the death penalty. The judge always emphasized that Petitioner was "running the show" and that counsel was simply there to advise. As there was not a waiver of counsel from Petitioner, the role of defense counsel was very ambiguous. However, one thing was clear, Petitioner was in control of central trial decisions and other functions that are normally the province of attorneys.

In a sentencing trial that occurred five months after the guilty pleas were entered Petitioner testified against the wishes of defense counsel. During his testimony, Petitioner read a letter he sent to jurors threatening a "severe and bad penalty" if the jurors did not sentence him to die in Georgia's electric chair. "I might want to get even with you to get revenge. How do you know that I will not get out of prison and torture your children?"

HOW THE FEDERAL ISSUES WERE RAISED AND RESOLVED BELOW

On appeal to the Supreme Court of Georgia, Petitioner claimed that the trial court erred by denying Petitioner his right to represent himself without conducting

an inquiry into his waiver of right to counsel under *Faretta v. California*, 442 U.S. 806 (1975).

The Supreme Court of Georgia concluded that the trial court did not need to conduct a hearing on Petitioner's waiver of counsel as Petitioner had just been found competent and he was allowed to represent himself. The court also held that the hybrid arrangement properly respected Petitioner's right to make the ultimate decision about what sort of case to present and that his trial attorneys were not acting as co-counsel, rather they were acting as Petitioner's counsel and representing his desire to receive the death penalty.

Because Petitioner raised his claims as a violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution as well as based on federal constitutional law, the federal question was properly raised and necessarily decided by the Supreme Court of Georgia.

REASONS FOR GRANTING THE WRIT

This case involves a set of issues concerning whether waiver of the right to counsel is required whenever a defendant proceeds with hybrid counsel. The procedural confusion has led to a strong disagreement among the states and circuits as to whether 1) waiver is always required; 2) waiver is required only when the defendant assumes some level of control over representation; or 3) waiver is never required if counsel assists in any capacity. A related doctrinal issue would seek for this Court to clarify the standard for a valid waiver of the right to

counsel. As it stands now, this issue presents a wide spectrum of holdings among the federal courts and state courts of last resort which range from highly formalized requirements to vague "totality of the evidence" standards for a proper waiver.

The opinion below and the way this record squarely poses the issues for resolution make Petitioner's case an ideal vehicle for the Court to clarify this important area of Sixth Amendment law while finding that Petitioner's constitutional rights were blatantly disregarded.

1. THIS COURT SHOULD SETTLE THE PROCEDURAL CONFLICTS SURROUNDING *FARETTA V. CALIFORNIA* BY REQUIRING A VALID WAIVER OF THE RIGHT TO COUNSEL IN EVERY FORM OF HYBRID REPRESENTATION, OR AT LEAST THOSE FORMS CEDING CONTROL TO DEFENDANTS OF CENTRAL TRIAL DECISIONS AND FUNCTIONS THAT ARE ORDINARILY THE PROVINCE OF ATTORNEYS.

This Court recognized the right to self-representation in *Faretta v. California*, 442 U.S. 806 (1975). However, after that decision, lower courts were left with little guidance as to the procedures of enforcing such a right. This has led to inconsistent applications of *Faretta*, as well as, an interesting landscape of pro se representation in many distinct forms. For example, when a defendant chooses to represent himself, the trial court may appoint standby counsel to assist the defendant as he conducts his defense. In addition, out of the right to represent oneself has also grown a component of "hybrid" representation – where a defendant conducts a portion of his defense

while an attorney conducts the balance. The concern of Petitioner's question is with hybrid representation.

After the defendant communicates to the court that he wants to proceed pro se, the trial court has a duty to inform the defendant of the right to counsel as well as the potential problems inherent in self-representation. Such a colloquy is commonly referred to as a "*Faretta* hearing." After such a colloquy has occurred the defendant must clearly state his waiver of the right to counsel and unequivocally elect to proceed pro se. However, because of the lack of a uniform standard, lower courts seem to enjoy broad discretion in how they inform defendants concerning their right to represent themselves. Secondly, while *Faretta* may have provided minimal guidelines for proceeding pro se, it did not provide any guidelines for proceeding with hybrid representation. This has led to a split in the lower courts on the issue of whether a valid waiver of the right to counsel is required when a defendant elects to proceed with hybrid representation. Once the trial court has granted the request, Petitioner argues that a defendant must then waive his right to counsel since the defendant is gaining control of those matters usually in the province of attorneys.

In the present case, Petitioner was adamant in his desire to proceed pro se. He felt that his wish to receive the death penalty conflicted with his trial attorney's goal that he not receive the ultimate punishment. After a competency jury found Petitioner competent, Petitioner once again asked to represent himself. The trial court stated that he was not inclined to let Petitioner represent

himself; however, after urging Petitioner to plead guilty, the judge put Petitioner in control of the penalty phase case. He would be allowed to pick the jury, address the jury, decide what mitigation evidence to present, give closing/opening arguments, and anything else he wanted. Trial counsel was allowed to advise Petitioner, argue before the court and the jury, and present mitigation. Counsel did not, however, assume all the duties of a full-fledged counsel. For example, Petitioner proceeded with his theory that he should get the death penalty for his crimes, determined which documents were presented for admission, determined what questions were asked of the witnesses, addressed the court, and read to the jury a letter in which he asked for the death penalty and promised to punish the jurors if they did not grant him his wish.

The question at issue here is not whether the court has authority to allow a hybrid form of representation by which the defendant assumes some of the lawyer's functions. This decision is clearly within the court's discretion. Rather, the question in this case is whether the court in Petitioner's case erred by not conducting a *Faretta* hearing regarding Petitioner's desire to waive counsel and proceed with hybrid representation. The trial court, in denying Petitioner's request to proceed pro se, allowed Mr. Colwell a hybrid form of representation in which Petitioner assumed some of the lawyer's functions. Counsel asked repeatedly for the trial court to hold a *Faretta* hearing so Petitioner would knowingly and intelligently waive his right to counsel since Petitioner was assuming some of the core functions of counsel. The trial court not only denied that request, but also admitted on the record

that he did not know what *Faretta* was. "When the accused assumes functions that are at the core of the lawyer's traditional role, . . . he will often undermine his own defense." *United States v. Kimmel*, 672 F.2d 720, 721 (9th Cir. 1982). Since Mr. Colwell had a constitutional right to have his lawyer perform core functions, when he decided to waive those rights he must do so knowingly and intelligently. The trial court erred in not requiring a waiver of counsel and thereby violated Petitioner's Sixth Amendment rights.

A. A Conflict Exists Between States And Circuits Over Whether A Valid Waiver Must Be Obtained When A Defendant Proceeds In Hybrid Representation.

In a criminal proceeding, a defendant has the choice to be represented by counsel or to conduct his own defense. *See United States v. Dujanovic*, 486 F.2d 182, 185 (9th Cir. 1973), *People v. Partee*, 511 NE.2d 1165 (Ill. App.Ct 1987) (holding the accused has no right to both representation of counsel and to proceeding pro se in portions of the trial). However, the trial court has the discretion to allow the defendant the ability to assume some of the attorney's functions, while the attorney does the remaining. In *United States v. Kimmel*, 672 F.2d 720, 721 (9th Cir. 1982), the court held that "the district court has the authority to allow, if the accused desires, a hybrid form of representation in which the accused assumes some of the lawyer's functions." In *Kimmel*, the court questioned the use of hybrid representation, but concluded that the court had the power and the burden to allow it.

The question of whether wavier is required in instances of hybrid representation advances many different answers depending on the court the defendant is in. Generally, the cases on necessity of valid waiver to support hybrid representation fall into three categories (a) waiver required; (b) some intermediate rule; and (c) waiver not required.

1. Waiver Of Counsel Is Always Required When Permitting Defendant To Lead His Defense.

In the case of *Whaley v. Thompson*, 22 F.Supp.2d 1146 (D.Ore. 1998), Petitioner argued that his decision to represent himself was not voluntary. He stated that he was forced to go pro se by his counsel's lack of preparation for trial. The court held that the defendant's decision to waive counsel must be knowing, voluntary, and intelligent. The court further stated that waiver is required even if the court approves a "hybrid representation" in which the defendant functions as co-counsel.

The Supreme Court of Virginia held that when counsel has been appointed to act as legal advisor to a defendant who has claimed the right to defend himself, such representation is not the equivalent of full representation for the purposes of waiver. *See Superintendent of Powhatan Correctional Center v. Barnes*, 221 Va. 780, 273 S.E.2d 558 (1981). For purposes of the waiver, it is not constitutionally sufficient unless it is competently and intelligently made and the court below decided in error that a waiver pro tanto is constitutionally sufficient. *Id.*

In a Missouri case, the court of appeals held that the record sustained a reasonable belief that the defendant lacked the competence to stand trial. *See Missouri v. Howard*, 668 S.W.2d 191 (Mo.Ct.App. 1984). The trial court had allowed the defendant to lead his defense with minimal hybrid representation from his public defender. The court held that there was no evidence in the record from which to gather that the defendant had the ability to make major defense decisions, hence it was erroneous for the trial court to grant defendant's request to represent himself without having a competency hearing or without determining if his waiver of counsel was valid.

In *State v. Frye*, 224 Conn. 253, 617 A.2d 1382 (1992), the Supreme Court of Connecticut discussed the two tests some appellate courts use for determining if a valid waiver is required in cases of hybrid representation. Under a "dominant role" analysis a waiver is required when a defendant assumes responsibility of the case. If counsel retains control over the case, the defendant has not waived his right to counsel. *See People v. Jones*, 53 Cal.3d 1115, 811 P.2d 757 (1991). The second test concerns the "core functions" mode of analysis. If the defendant performs core functions that he has a constitutional right to have his attorney perform, then a valid waiver of his right to counsel is required.

The court in *Frye* declined to adopt either of the tests for determining when wavier is required in the case of hybrid representation. The court deemed it next to impossible to determine the functions either party will perform prior to the start of trial. *Id.* at 259. Rather, the court held that when a defendant requests a partial waiver of the right to counsel, the court must employ the

same procedural safeguards that are required to ensure a knowing and intelligent waiver of the entire right to counsel. A waiver is required in such situations because "whatever label is attached to [the representation arrangement], the net result [is that a defendant] had less than the full representation by counsel to which, absent a valid waiver, he was entitled under the constitution." *Maynard v. Meachum*, 545 F.2d 273, 277 (1st Cir. 1976).

2. Waiver Is Sometimes Required If Attorney Is Not Present To Assist Defendant.

In *Missouri v. McGee*, 781 S.W.2d 161 (Mo.Ct.App. 1989), defendant waived counsel and proceeded pro se. At defendant's request the trial court ordered appointed counsel to be present at counsel table throughout the trial to furnish defendant with legal advice that he sought. On appeal, defendant claimed that his waiver was not voluntary. The court held that defendant's waiver was proper, moreover, hybrid representation was provided and defendant was not without counsel, and thus, defects in the waiver of counsel were not grounds for reversal. Also, the Missouri statute which mandated a written waiver of counsel was inapplicable because no actual waiver could occur when an attorney was present to assist the defense. *See Missouri v. Harper*, 637 S.W.2d 170 (Mo.Ct.App. 1982).

3. Waiver Of Right To Counsel Is Not Required In Order For Trial Court To Provide Hybrid Representation.

The United States District Court for the Middle District of Pennsylvania concluded that *Faretta* does not

require a waiver of the right to counsel before the trial court may exercise its discretion to permit hybrid representation. *See Banks v. Horn*, 63 F.Supp.2d 525 (M.D.Penn. 1999). The court reasoned that proceeding with hybrid representation is not an election to proceed pro se and thus does not require the trial court to conduct a colloquy to determine whether any waiver of right to counsel was knowing and voluntary. The question of waiver does not arise in cases of hybrid representation, but a warning by the trial court concerning the risks of hybrid representation may be appropriate in some cases. *See Tennessee v. Franklin*, 714 S.W.2d 252 (Tenn. 1986).

Similarly, the Supreme Court of Mississippi, while looking at the totality of the circumstances surrounding the representation of the defendant determined that the defendant only had a participatory role in his defense, hence the defendant, received hybrid representation. *See Metcalf v. Mississippi*, 629 So.2d 558 (Miss. 1993). Consequently, the defendant was not entitled to a wavier of counsel inquiry since he did not represent himself. Along the same lines, in *Bright v. State*, 68 Md.App. 41, 509 A.2d 1227 (1986), the court held that in cases of hybrid representation and not sole representation in which defendants were never without the advice and knowledge of an attorney, waiver of counsel inquiry is not required.

4. The Better Rule Requires A Valid And Constitutional Waiver In Every Case Of Hybrid Representation.

The need for a waiver in cases of hybrid representation is a logical extension of the requirement of the

waiver in cases of stand-by counsel. When a defendant assumes any of the functions traditionally performed by counsel, he potentially undermines his own defense and therefore he must assure the court that he is doing so knowingly and intelligently. *See Kimmel*, 672 F.2d at 721. A precise wavier of the right to counsel is required to provide guidance for trial judges to ensure that the rights of the defendant are protected. Most important, however, is the need for the defendant to have the benefit of an explicit cautionary instruction upon which he or she may base the decision to waive counsel.

a. The Judge Is Relieved Of The Burden Of Policing Defendant Autonomy When She Can Rely On A Valid Waiver In The Record.

The procedural confusion surrounding *Faretta v. California* has led to excessive involvement of judges in protecting the autonomy of defendants such as Petitioner at the expense of the interests in fair and adequate representation underlying the right to counsel. Consequently, if the procedures for self-representation were clarified, the judge would have less motivation to interfere with the attorney-client relation. By requiring a knowing, intelligent, and voluntary waiver the judge will then appear to have judicial impartiality, and the judge will avoid the conflicts of interest which may occur if he is supposed to be making neutral decisions while informing the defendant of the law.

In Petitioner's case, the trial judge was encouraging Petitioner to proceed without the aid of counsel because

the judge found that Petitioner was in control of the case. This push by the judge, however, was only furthering Petitioner's desire to be sentenced to death against the adamant disapproval by Petitioner's hybrid counsel. Because of the lack of waiver, which led to an ambiguous attorney-client relationship, the trial court was acting as an advocate in Petitioner's desire to receive the death penalty. The court should have never interjected itself so deeply into Petitioner's death wish. Had waiver of counsel been determined, the court would not have had to advise Petitioner on how to proceed against the wishes of his defense team – who were trying to save his life.

b. Procedural Clarity Will Prevent Bestowing Control On Defendants Lacking The Capacity To Make Valid Waivers Of The Right To Counsel.

When a defendant requests to represent himself the court must keep in mind that the right to a fair trial is "the most fundamental of all freedoms." *Estes v. Texas*, 381 U.S. 532 (1965). Requiring a waiver ensures that a defendant is "aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Faretta v. California*, 422 U.S. at 835. Some defendants are caught in the middle of being competent to stand trial and may even be able to waive the right to counsel, but clearly incompetent to undertake the role of self-representation. By requiring an unequivocal waiver in cases of hybrid representation trial judges will be better equipped to balance the right to self-representation and the right to a fair trial.

A valid waiver could not have been obtained in Petitioner's case given his mental condition and a clear procedural rule would have prevented the court from permitting Petitioner to exercise such control at trial.

B. The Lack Of A Clear Standard For Valid Waiver Of The Right To Representation And The Arbitrary Application Of The *Faretta* Decision, Disables A Defendant From Deciding Knowingly, Intelligently And Unequivocally To Proceed Pro Se Thereby Resulting In Unfairness And Confusion.

Apart from the trial court's initial duty to inform the defendant of the right to counsel once the defendant chooses to proceed pro se, *Faretta* requires that the trial court admonish the defendant as to the risks of proceeding without counsel. Courts, however, have never mandated what constitutes a proper judicial inquiry into the defendant's understanding of the admonishment. While *Faretta* established some basic guidelines, it failed to provide adequate standards for trial courts determining if a defendant is capable of a knowing and voluntary election to proceed pro se or with hybrid counsel. The three prong test for valid waiver of the constitutional right to counsel emerges from *Faretta v. California*, 422 U.S. 806 (1975). Different courts apply the terms knowing, intelligent, and unequivocal differently, illustrating the amorphous and unclear status of a valid waiver. A defendant may make a valid waiver when he does so knowingly, intelligently and unequivocally. What standard do those requirements impose on the court? A mere desire to waive one's right is not sufficient to constitute a valid and binding waiver.

United States v. Balough, 820 F.2d 1485 (9th Cir. 1987), cites *Faretta* saying, " ' a waiver of counsel will be considered knowing and intelligent ONLY if the court makes the defendant aware of (1) the nature of the charges against him (2) the possible penalties and (3) the dangers and disadvantages of self-representation. . . . ' " (emphasis added). The *Faretta* court expanded these three prongs to allow those deemed mentally competent to stand trial also competent to proceed pro se. The expansion does not allow the judiciary to stand guard between the defendant's right to proceed pro se and his right to disclosure of the hindrance inherent in the right of that waiver. It is irresponsible to expect a lay defendant to make a knowing and intelligent waiver when the courts themselves have not established a standard framework for the usage and allowance of the waiver.

Faretta requires a proper hearing to determine whether the defendant waived his right under the three prong test. The first prong, knowing, requires the knowledge of the inherent right bestowed by the Constitution requiring overt action to waive a right and knowing of the severe consequences of doing so. *U.S. v. Kimmel* held, " A well-educated defendant who was assisted by advisory counsel throughout his case, who had been prosecuted several times before and had even represented himself in at least one case, would not be deemed to understand sufficiently, the dangers and disadvantages of self-representation absent additional facts such as indicating that he had been informed about the risks of self-representation at some point previously." 672 F.2d 720, 722, (9th Cir. 1984). *Kimmel* declares familiarity with practice and procedure insufficient. "Knowing" stems from

specialized training in the law and the nuances of the justice system.

The second prong of the *Faretta* test requires an intelligent waiver. Just knowing what the right is, is insufficient. The court must instruct the defendant on the specific disadvantage to waiving his right so the record shows he is making his decision with "eyes open." *Faretta*, 422 U.S. 806 at 835. Case law shows that disadvantages include but are not limited to the possibility of sanctions, adherence to unfamiliar rules of the court and adherence to the rules of evidence.

The final prong requires an unambiguous statement expressing the defendant's desire demonstrating a knowing and intelligent choice: " . . . a valid waiver of the right to counsel must be unequivocal." *United States v. Van Krieken*, 39 F.3d 227, 229 (9th Cir. 1994). An unequivocal pronouncement of pro se representation requires more than mere clarity and should be made while the judge engages in a colloquy with the defendant. There are no required formulaic words, the defendant must make a clear statement recognized by the court in order to proceed pro se. The judge should focus on what the defendant comprehends rather than what the court understands. *U.S. v. Kimmel*, 672 F.2d 720 at 722. The requirement of an unequivocal declaration manifests itself in the requirement for a knowing waiver.

For this reason, *Faretta* requires a colloquy between the judge and the defendant. The judge as fact finder acts to elicit from the potential pro se defendant the extent to which he understands the judicial system, to what extent he has the knowledge, intellect and surety to give himself

the zealous representation he is entitled too under the Sixth Amendment.

1. Recognizing The Lack Of Workable Standard For Valid Waiver Of Counsel, Various States And Circuits Employ Conflicting Tools To Clearly Define The *Faretta* Test And Identify A Valid Waiver Of The Sixth Amendment Right To Counsel.

Some states recognize the complexity of the right of waiver and rarely find the defendant intelligently and knowingly waived his right even when the statement seems unequivocal. The states take various approaches when evaluating a waiver of the right to counsel. In Wisconsin, the court uses a higher standard than used to find competence to stand trial. The court assumes the defendant has not waived his right to counsel and the burden shifts to the state to rebut that presumption. *Wisconsin v. Klessig*, 564 N.W.2d 716, 721 (1997). In Georgia, even a defendant's signature on an explicit document describing the waiver is not sufficient to show a valid waiver of one's right. *Hamilton v. State*, 504 S.E.2d 236, 241 (1998). Maryland requires that the defendant demonstrate a meritorious claim for waiver and a reflection in the record of the court's consideration of that reasoning. *Mitchell v. Maryland*, 337 Md. 509, 517 (1995).

The Wisconsin Supreme Court held, a person seeking to represent himself must engage in a colloquy with the judge to ensure that the defendant is making a deliberate and voluntary choice. In *Wisconsin v. Klessig*, 564 N.W.2d 716, 718 (1997), the court reversed a conviction and

remanded the case for an evidentiary hearing to determine three issues: (1) did defendant knowingly, intelligently and voluntarily waive his right to counsel, (2) was there an adequate and meaningful nunc pro tunc inquiry conducted to determine whether the defendant was competent to represent himself, and (3) if that inquiry can be conducted was the defendant competent to represent himself. The court held the petitioner to a higher standard for representation than for ability to stand trial and shifted the burden to the state to show that petitioner completed a valid waiver. If the State cannot show by clear and convincing evidence a valid waiver, done knowingly, voluntarily and intelligently the defendant is entitled to a new trial. Defendant's competency must appear in the record.

The Georgia Court of Appeals reversed and remanded the conviction of a woman who signed an explicit waiver of her right to counsel. Ms. Hamilton proceeded pro se, testified on her own behalf and insisted the trial not be recorded by the court reporter. Further, she signed a lengthy and descriptive waiver. The court still held, she had not knowingly made a valid waiver, " . . . the totality of the evidence . . . must show that the trial court provided sufficient information, assistance, and support to allow the defendant to make a truly informed decision to knowingly relinquish counsel. . . . " *Hamilton v. State*, 504 S.E.2d 236, 241 (1998). The State did not meet its burden to prove a valid, knowing and voluntary waiver. The court did not tell the defendant she had a right not to testify. She did not know that if she did not introduce character evidence, the state could not introduce evidence to rebut her character. She should have

struck a former prosecutor from the jury but again, she did not know this was her right. Though the waiver was explicit about defendant relinquishing her rights it did not specify those rights or the consequence of waiving them.

In *Mitchell v. Maryland*, 337 Md. 509, 513 (1995), the court advised the defendant to acquire a lawyer and scheduled a postponement for that purpose. The judge warned the defendant that his next appearance without counsel would constitute a waiver. The court of appeals disagreed with the court of special appeals granting of limited remand because the issue of waiver is not subsidiary to the criminal trial. The court must allow the defendant to explain the reason for appearing without counsel in order for the court to judge the defendant's reason on its merits. The record must reflect that the court considered those reasons. An explicit but not proscribed inquiry is required before the court may exercise its discretion.

The above courts utilize a heightened standard of review. Several others use a much lower standard to determine a defendant's right to proceed pro se. Because the right to representation is constitutional, the review to determine the converse, the right to represent oneself, must be evaluated by uniform standard. Currently, there is no uniform standard or application among the states. The Supreme Court of California held that the defendant's entitlement to *Faretta* warnings depends on whether he chooses self representation or to have counsel and retain for him/herself some function as co-counsel. *People v. Jones* 811 P.2d 757, 773. If the defendant chooses to represent himself, the *Faretta* warnings must be given

and the record must reflect that the defendant understands the disadvantage of representing himself including the dangers and disadvantages of his particular case. If the defendant chooses to maintain counsel and still function as limited co-counsel the defense attorney retains control of the case and can "prevent the defendant from taking actions that may seriously harm the defense . . . the trial court may, but need not, warn the defendant of the problems of being co-counsel." *Jones,* 811 P.2d at 773.

2. The Lack Of A Clear Standard For Valid Waiver Requires The Judge To Depart From Her Role Of Impartial Fact Finder And Gatekeeper.

The lack of a standard forces the judge to interfere with defendant's counsel and the defendant's ability to waive his right to counsel. The judicial system is naturally adversarial and its diminution creates an unfair proceeding. The central issue is whether the court interfered with the Petitioner's defense by functioning as an advocate rather than an impartial "gatekeeper." The right to a fair trial is deeply rooted and cannot be waived. Why then by implication do we allow a person to waive his right to counsel and ultimately his right to a fair trial. "A waiver of counsel cannot be knowing and intelligent unless the accused appreciates the possible consequences of mishandling these core functions and the lawyers' superior ability to perform them." *Faretta v. California, supra.* Referring back to *Kimmel,* the court never expresses what the "core functions" are and so the defendant who chooses representation should be given *Faretta* warnings

because, the system is not designed for the amateur self-advocate. *Kimmel* at 721. Because of this system design, the court must be certain that a person waiving his/her right to counsel internalizes the appreciable consequences of doing so.

The minimal standard of competence required to stand trial is not sufficient to measure competence for the purpose of pro se representation. The more familiar a person is with the complex system, the more likely he is to avoid proceeding without the benefit and safeguard of counsel.

In the instant case, the defendant's capable lawyers were appointed because of his indigent status and the gravity of the crime. Both the court and the client tied the hands of appointed counsel. Petitioner told his counsel that he would like to represent himself. Under obligation, defense counsel expressed those wishes to the court but stated they could not ethically concede. The court would not allow Petitioner's attorneys to withdraw from the case. In *Thomas v. Commonwealth of Virginia*, 539 S.E.2d 79 (2000), the court found the defendant knowingly and intelligently waived his right and still did not allow him to represent himself because they were concerned about the danger of the defendant's lack of sufficient legal knowledge. *Id.* at 567. The defendant's legal knowledge " . . . [is] not relevant to an assessment of his knowing exercise of the right to defend himself." *Faretta*, 422 U.S. at 806.

Counsel then urged the court to conduct a *Faretta* hearing and the court declined. *Faretta* designed the hearing as a tool so the judge could rule on defendant's

competency and remain impartial. The hearing is a fact-finding tool. The court held itself out as an advocate for Petitioner's desire for electrocution neglecting its duty to act as a neutral fact finder. The judge repeatedly stated that he was inclined to let Petitioner control his own case entirely but would not allow Petitioner to represent himself and would not allow defense counsel to prevent Petitioner from making decisions detrimental to his case.

The same danger exists when courts mirror the *Jones* decision in the Supreme Court of California where the required judicial inquiry of the defendant varies in degree. When the defendant chooses to act as his/her own attorney even while maintaining counsel in an "advisory capacity" the judge is required to explain, and the record must show, the judge did explain the danger of self-representation. *Jones,* 811 P.2d at 773. When the defendant acts as co-counsel with his/her attorney the trial court "may, but need not, warn the defendant of the problems of being co-counsel." The conflict is that some of these dangers are the same as those for complete pro se representation. In *Jones* the defendant did not participate in his defense nor try to change counsel's decisions. In the instant case, the client did participate. Following the *Jones'* thought pattern places the *Faretta* warning on a sliding scale.

In *United States v. Dujanovic,* 486 F.2d 182 (9th Cir. 1973), the court cited *Arnold v. United States,* 414 F.2d 1056, 1058 (9th Cir. 1969), saying that "A court has no more right to force an attorney on a defendant than it has to ignore the Sixth Amendment right to counsel." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938), asserts the general rule that relinquishment of a known right or privilege and the

determination of whether that waiver is intelligent depends on the facts and circumstances of that particular case, not limited to the background, experience and conduct of the accused. The two rules cannot be reconciled because the court imposed an unclear method of counsel upon Petitioner without regard for the *Zerbst* holding. Balancing between forcing counsel on a defendant desiring to waive that right and investigating to what extent he is knowingly, voluntarily, and intelligently doing so should be the court's goal. The likely result of that discovery will be a fair assessment of defendant in accordance with the three prongs and ultimately a fair trial. The confusion surrounding this case paves the way for a clear standard that defendants can use to decide to proceed with or without counsel and that courts can use to determine if that decision is knowing/voluntary, intelligent and unequivocal.

All of these are grave concerns impacting the dignity and fairness of the trial process and the ability to waive one's constitutional right. The greater impact is on the process of the act of waiver, illustrating that waiving one's right to counsel is taken so seriously by the Court that without an explicit inquiry like that of *Faretta*, and a clear standard to determine validity of a waiver, the Court cannot rule fairly on the right to represent oneself.

CONCLUSION

In summary, this Court should grant certiorari to settle the procedural conflict surrounding *Faretta v. California*. The absence of a strict rule requiring the courts to

obtain a valid waiver of counsel in every hybrid representation case results in just the sort of breakdown in the adversarial process and fundamentally unfair trial accorded Daniel Colwell. The trial court's failure to obtain a valid waiver of right to counsel and the Supreme Court's affirmance of that decision violated Petitioner's Sixth Amendment rights.

Respectfully submitted,

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Supreme Court of Georgia.

COLWELL

v.

The STATE.

No. S00P1959.

March 2, 2001.
Reconsideration Denied April 5, 2001.

Kenneth D. Driggs, Michael Mears, Atlanta, for appellant.

John R. Parks, District Attorney, Daniel Patrick Bibler, Assistant District Attorney, Thurbert E. Baker, Attorney General, Patricia B. Attaway Burton, Assistant Attorney General, Susan V. Boleyn, Senior Assistant Attorney General, for appellee.

Ronald S. Honberg, J.D., Rex W. Cowdry, M.D., Arlington, for amicus appellant.

BENHAM, Chief Justice.

In 1996, Daniel Morris Colwell was charged with numerous offenses arising out of the fatal shootings of Judith and Michael Bell in a Sumter County store parking lot. Immediately after a jury found Colwell competent to stand trial, he pled guilty to two counts of malice murder, six counts of felony murder, two counts of aggravated assault, possession of a firearm by a convicted felon, possession of a firearm at a public gathering, and carrying a pistol without a license.[1] In the sentencing trial that

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[1] The crimes occurred on July 20, 1996. Colwell was indicted by a Sumter County grand jury on December 2, 1996, for the crimes to which he pled guilty. The State filed written

was convened five months after the guilty pleas were entered, a second jury found the existence of statutory aggravating circumstances beyond a reasonable doubt and fixed the penalty for both of the malice murder charges and for each of the six felony murder charges at death. The trial court imposed eight death sentences in accordance with the jury's determination. We affirm as to two of the death sentences, vacate the six convictions and death sentences for felony murder, vacate the convictions and sentences for aggravated assault, and affirm as to the remaining convictions and sentences.

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notice of its intent to seek the death penalty on February 14, 1997. The trial on Colwell's competency began on April 20, 1998, and ended on April 23, 1998, with the jury's finding that he was competent to stand trial. Colwell pled guilty to all charges on April 23 upon the conclusion of his competency trial. Colwell's sentencing trial began on September 30, 1998, and the jury fixed Colwell's sentences for each of the murder charges at death on October 13, 1998. In orders filed on October 15, 1998, the trial court imposed eight death sentences for the two malice murder convictions and the six felony murder convictions, two concurrent sentences of twenty years imprisonment for the two aggravated assault charges, and consecutive terms of imprisonment of five years for possession of a firearm by a convicted felon, twelve months for possession of a firearm at a public gathering, and twelve months for carrying a pistol without a license. A motion for new trial, filed on November 12, 1998, and amended on July 7, 1999, was denied in an order filed on November 1, 1999. On November 29, 1999, the trial court granted Colwell's motion for a 30-day extension of time in which to file a notice of appeal. *See* OCGA § 5-6-39(a)(1). A notice of appeal was filed on December 30, 1999, and the appeal was docketed in this Court on August 16, 2000. It was orally argued on January 22, 2001.

1. The evidence presented at Colwell's sentencing trial showed that Colwell, wishing to die but unable to commit suicide, formulated a plan to kill more than one person in order to secure his own execution. He put his plan in motion on July 20, 1996, when he drove to a store parking lot in Sumter County and approached Mitchell and Judith Bell as they conversed with a friend. Colwell shot Mr. Bell in the back, stood over him as he begged for his life, and shot him in the head. Colwell then shot Mrs. Bell in the head as she lay on the pavement wailing. Colwell left the Bells, got into his car, and drove to the Americus Police Department where he gave a tape recorded confession. In the tape-recorded statement, which was played for the sentencing jury, Colwell explained that he had purchased a handgun to commit suicide but "didn't have the nerve to pull the trigger to [his] head." He went on to say that he wanted to commit suicide and saw "going to the electric chair" as "a way of dying." After Colwell's counsel presented extensive evidence in mitigation, Colwell testified and told the jury he had committed the murders for the purpose of obtaining a death sentence and that he would kill again if he did not receive the death penalty.

After reviewing the record and transcript of this case, we conclude, with the exceptions set forth below, that the trial court correctly entered judgment on Colwell's guilty pleas and that the evidence presented at the sentencing trial was sufficient to authorize the jury to find the existence of at least one statutory aggravating circumstance for each murder beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); OCGA § 17-10-30(b)(2), (7).

2. Colwell's counsel contends that Colwell was improperly found competent to stand trial. Where a defendant's competence is challenged by the defense or appears to be in question at the time of trial, the Constitution of the United States requires that his or her competence be determined. *Drope v. Missouri,* 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson,* 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). The standard to be applied in making that determination is whether the defendant "is capable of understanding the nature and object of the proceedings and is capable of assisting his [or her] attorney with his [or her] defense." *Stripling v. State,* 261 Ga. 1, 2, 401 S.E.2d 500 (1991). *See* OCGA § 17-7-130. The extensive evidence presented at Colwell's competency trial supports the jury's finding that he was competent under this standard. Furthermore, our review of the trial record confirms the soundness of the jury's finding of competence, as it appears that Colwell participated intelligently in his trial proceedings. In fact, Colwell's intellectual grasp of his proceedings led to his ultimate decision to allow his counsel to present a vigorous mitigation case in order to increase the likelihood of having possible death sentences affirmed on appeal.

We are mindful of the fact that Colwell likely suffered from a mental disease and was plagued by a desire to die, however, we must acknowledge, as the competency jury and the trial court also did, that Colwell clearly understood the nature and object of his proceedings and that he possessed the intellectual and communication skills necessary to participate in his own case in the manner that seemed best to him.

3. Colwell's counsel contends that the trial court erred by denying Colwell his right to represent himself, by failing to conduct a hearing on Colwell's competence to waive his right to counsel, and by forcing a mixed form of representation upon Colwell. We find no error.

a. Throughout the competency and sentencing trials, Colwell and his counsel were in fundamental disagreement on the question of whether Colwell should receive the death penalty for his crimes. Fifty-five days before the competency trial, counsel filed a motion to withdraw from representation, asserting an unwillingness to serve as Colwell's "unquestioning mouthpiece. . . . " Counsel withdrew the motion to withdraw ten days later. Immediately after Colwell was found competent to stand trial, the trial court informed Colwell that from that point forward he would control his own defense and permitted him to plead guilty.

A month before the sentencing trial commenced, defense counsel filed a motion to withdraw Colwell's guilty plea. After hearing counsel's arguments about alternative pleas that could have been entered and after the trial court again explained to Colwell that he was in control of his defense, Colwell informed the trial court that he did not wish to withdraw his guilty pleas. Counsel urged the trial court to conduct a hearing on Colwell's competency to control his defense, but the trial court declined to do so.[2]

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[2] Ruling from the bench, the trial court stated, "The jury found him competent, he was competent, he entered a plea of guilty, he does not wish to withdraw his guilty plea and I will allow it to stand."

In a letter written shortly after his counsel filed the motion to withdraw the guilty pleas, Colwell explained to the trial court that he did not believe he needed an attorney and emphatically stated he would not have representing him an attorney who was not in agreement with himself and the district attorney. Shortly after Colwell's letter was written to the trial court, counsel once again filed a motion to withdraw. In a hearing held on September 17, 1998, the trial court explained again to Colwell and Colwell's counsel that Colwell would have ultimate authority over most matters in his case. It was decided that counsel should remain on the case, but counsel disagreed strongly with the trial court's beliefs concerning the role of counsel and the extent to which the client could control the case. Counsel also urged the trial court to conduct a hearing on Colwell's competence to control his defense, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Colwell informed the trial court that, because he was in control of his case, he was satisfied with his representation.

As voir dire of the prospective sentencing jurors began, the trial court again discussed the matter of representation with Colwell, explaining that Colwell would be in control of his case but adding, at one point, "I don't want to tell you I won't let you represent yourself." When asked by the trial court what he wanted, Colwell responded, "I just wanted to have control [of the case.]" In the ensuing discussion, it became clear that Colwell had decided to personally present his view of the case to the jury and to allow counsel to present mitigation evidence. Colwell summed up his decision as follows: "I

understand you [the trial court] have given me full control and I understand that I've decided to let my lawyers take control." Another long discussion concerning Colwell's representation took place at the end of voir dire. Counsel explained that Colwell had agreed to let counsel present mitigation evidence, and Colwell confirmed the agreement, explaining that he believed the introduction of mitigation evidence would prevent a reversal of any death sentence he might receive. The sentencing trial proceeded, with counsel presenting a mitigation case and Colwell telling the jury, through his testimony and in writing, that he should receive the death penalty.

b. Counsel argues on appeal that the trial court violated Colwell's rights under the constitutions of Georgia and the United States by refusing Colwell's request to conduct his case pro se. Having been found competent to stand trial, Colwell was entitled to represent himself at trial upon a request to do so and upon a finding that his decision was knowing and intelligent. *Id.*; Ga. Const., Art. I, Sec. I, Par. XII; *see Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) (holding that the standards governing competence to stand trial, to plead guilty, and to waive the right to counsel are the same, although the issues of competence and the knowing and voluntary nature of a decision are not the same). However, after the trial court explained to Colwell that he would be in control of his case and after he learned that any death sentence was more likely to be affirmed on appeal if a mitigation case were presented, Colwell gave his approval to counsel's representation. Colwell, it appears from the record, did not wish to represent himself but, rather, wished to have counsel represent his

interests as he perceived them. *See Potts v. State,* 259 Ga. 96, 105(28), 376 S.E.2d 851 (1989) (finding that the defendant "withdrew his request after the trial court gave him time to reconsider and reflect on the consequences of self-representation"); *see also Thaxton v. State,* 260 Ga. 141, 142(2), 390 S.E.2d 841 (1990) (holding that a request to conduct one's trial pro se must be "unequivocal"). Through the long and sometimes heated discussions between the trial court, Colwell, and counsel, Colwell's representation was finally arranged to Colwell's satisfaction. This arrangement properly respected Colwell's right to make the "ultimate decision about" what sort of case to present. *Morrison v. State,* 258 Ga. 683, 685- 86(3), 373 S.E.2d 506 (1988); *see also Reid v. State,* 235 Ga. 378, 379-80(1), 219 S.E.2d 740 (1975) (noting with approval the ethical standard that even those matters generally within the control of counsel should be decided "after consultation with [the] client"). We conclude that the trial court did not force unwanted representation upon Colwell.

Counsel's assertion that the trial court should have conducted a further hearing on Colwell's competence and on the knowing and voluntary nature of his decision about his representation is without merit. Colwell had just been found competent after a lengthy competency trial, and the trial court carefully explained Colwell's rights to him and made repeated and thorough inquiries of him concerning his decisions about his representation and whether those decisions were freely made. As we held in *Wayne v. State,* where the defendant *did* wish to waive his right to counsel, "The record need only reflect that the accused was made aware of the dangers of self-representation and nevertheless made a knowing and

intelligent waiver." *Wayne v. State*, 269 Ga. 36(2), 495 S.E.2d 34 (1998) (applying *Faretta*, supra, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562). Here, the trial court accepted the jury's finding of competence, informed Colwell of his rights, and accepted Colwell's decision to allow counsel to present a mitigation case and to present his own point of view in other ways. Although we note that such an inquiry is not generally required where a defendant elects to face trial *with* the representation of counsel, the trial court's inquiry in this case, which was prompted by Colwell's expressed concerns to the trial court, was sufficient to ensure the knowing and voluntary nature of Colwell's final decision on the nature of his representation.

Counsel argues that a hybrid form of representation was forced upon Colwell, with counsel serving effectively as co-counsel. *See Potts v. State*, 259 Ga. 812, 816, 388 S.E.2d 678 (1990) (holding that a trial court may not force co-counsel upon a defendant who wishes to represent himself or herself). This claim is without merit. Although Colwell testified at trial, wrote several letters that were presented to the jury, and directed some of the actions of his counsel, he was acting merely as an involved client who wished to have his own views made known to the jury. By ensuring that counsel respected Colwell's wishes, the trial court did not transform counsel into *co*-counsel, rather, it ensured that counsel served as *Colwell's* counsel. Furthermore, although we do not find that Colwell served as co-counsel, we note that, "although a defendant may not insist on acting as co-counsel, the trial court may . . . allow him [or her] to do so" once he or she has been advised of his or her right to counsel and of the

dangers inherent in proceeding as one's own co-counsel. *Hance v. Kemp*, 258 Ga. 649, 650(1), 373 S.E.2d 184 (1988).

Counsel argues that the trial court's inquiries into the relationship between counsel and Colwell were improper, especially because the inquiries were made in open court. In light of the circumstances, we find that the trial court's involvement in the attorney-client relationship was appropriate. Counsel has failed to show any evidence in the record that counsel or Colwell ever requested that the trial court's inquiries be made in camera; furthermore, the information revealed to the State during the trial court's inquiries would not have affected the outcome of the case in the slightest. Compare *Brooks v. State*, 259 Ga. 562(2), 385 S.E.2d 81 (1989) (holding that a hearing on the indigent defendant's motion funds for psychiatric assistance should be conducted in camera in order not to disclose the defendant's theory of defense).

4. Contrary to counsel's contention, "[t]his Court's review of death sentences is neither unconstitutional nor inadequate under Georgia statutory law." *Gissendaner v. State*, 272 Ga. 704, 716(16), 532 S.E.2d 677 (2000).

5. We disagree with counsel's contention that imposition of the death penalty for the murders Colwell has committed will constitute assisted suicide under Georgia law or under more general conceptual principles.

> Any person who publicly advertises, offers, or holds himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide and commits any overt act to further that purpose is guilty of a felony. . . .

OCGA § 16-5-5(b). Ignoring the other intricacies of this statute, we conclude that Colwell's execution will not be a "suicide" and, therefore, that the statute is inapplicable. Colwell has been sentenced to death because of the nature of his crimes, not because of his own desire to die. Furthermore, the jury, not Colwell, has made the final determination that death is the appropriate punishment for his crimes. *See People v. Bloom*, 48 Cal.3d 1194, 259 Cal.Rptr. 669, 774 P.2d 698, 715 (1989). The fact that Colwell agrees with the jury's determination that his crimes deserve death is immaterial.

6. Counsel contends that the trial court erred by denying a defense motion seeking either to have execution by electrocution declared unconstitutional or, in the alternative, to have an evidentiary hearing on the matter. In a hearing held prior to the sentencing trial, the trial court inquired of defense counsel whether he wished to have evidentiary hearings on any of the outstanding defense motions. After an exchange between the trial court, the district attorney, and defense counsel that left unclear whether defense counsel wished to pursue the request for an evidentiary hearing on electrocution, defense counsel conferred with co-counsel and then stated that he did not think there were any evidentiary matters to be dealt with other than victim impact evidence. In light of this comment, we conclude that counsel withdrew the request for an evidentiary hearing on electrocution. In the absence of admissible evidence demanding a different result, the trial court did not err in declining to declare execution by electrocution unconstitutional. *See Esposito v. State*, 273 Ga. 183, 186(3)(b), 538 S.E.2d 55 (2000).

7. Counsel contends that, should this Court affirm Colwell's death sentence, Colwell should be permitted to elect lethal injection instead of electrocution as the method by which his sentence is carried out. There is no statutory provision in Georgia that permits a person sentenced to death to choose the method of execution. Because Colwell's crimes were committed before May 1, 2000, electrocution is the statutory method of execution. OCGA § 17-10-38. Should electrocution be declared unconstitutional by this Court or the Supreme Court of the United States, lethal injection will be the means by which Colwell is executed.[3]

8. In a brief filed shortly after this appeal was docketed, counsel argued that due process concerns were raised by the trial court's failure to file the required trial judge's report. *See* OCGA § 17-10-35(a); Unified Appeal Outline of Proceedings (IV)(A)(3)(a). Because the trial judge's report was subsequently transmitted to this Court as required and because counsel for Colwell and the State had ample opportunity to inform this Court of any response they might have to its contents, counsel's argument has become moot.

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[3] In an uncodified section of Ga. L.2000, p. 947, the General Assembly stated its intention that "persons sentenced to death for crimes committed prior to [May 1, 2000] be executed by lethal injection if the Supreme Court of the United States declares that electrocution violates the Constitution of the United States or if the Supreme Court of Georgia declares that electrocution violates the Constitution of the United States of the Constitution of Georgia."

9. When a defendant is found guilty and sentenced for malice murder, the trial court should vacate any felony murder convictions for the same killing. *See Malcolm v. State*, 263 Ga. 369, 371-72(4), 434 S.E.2d 479 (1993); *see also* OCGA § 16-1-7(a)(1). Accordingly, we vacate Colwell's six convictions and death sentences for felony murder.

10. The factual basis set forth in support of Colwell's guilty pleas was insufficient to authorize the trial court to enter convictions and sentences against Colwell for both the two malice murders charges *and* the two aggravated assault charges. Where, as here, the evidence proving an aggravated assault is the same as the evidence proving murder, the two crimes merge as a matter of fact. *McDade v. State*, 270 Ga. 654, 655(1), 513 S.E.2d 733 (1999); *Fitzpatrick v. State*, 268 Ga. 423, 423-24(1), 489 S.E.2d 840 (1997); *Griffin v. State*, 265 Ga. 552, 553(1), 458 S.E.2d 813 (1995). Accordingly, we vacate Colwell's two convictions and sentences for aggravated assault.

11. As explained below, several of the jury's findings regarding statutory aggravating factors in this case must be set aside. Doing so, however, does not affect the two death sentences affirmed in this opinion.

a. The jury found, as to the murder of Mitchell Bell, that the OCGA § 17-10-30(b)(7) statutory aggravating circumstance existed because (1) the murder was outrageously and wantonly vile, horrible, or inhuman in that (2) it involved depravity of mind, an aggravated battery to Mitchell Bell, and an aggravated battery to Judith Bell. The jury's finding regarding the aggravated battery to

Judith Bell cannot support this statutory aggravating circumstance, which refers only to "an aggravated battery *to the victim*. . . . " OCGA § 17- 10-30(b)(7) (emphasis supplied). Nevertheless, the jury's other findings adequately support this statutory circumstance as to Mr. Bell's murder.

b. The same error also appears in the jury's finding of the OCGA § 17-10-30(b)(7) statutory circumstance regarding the murder of Judith Bell. Additionally, the jury's finding that the murder of Judith Bell was committed during the commission of an aggravated battery against Mrs. Bell cannot stand because Mrs. Bell was murdered with a single shot, albeit a single shot that first passed through her hand and that disfigured her. Nevertheless, the jury's findings that Mrs. Bell's murder was wantonly vile, horrible, or inhuman and that it involved torture and depravity of mind adequately support the OCGA § 17-10-30(b)(7) statutory circumstance as to her murder.

c. The jury found that the murder of Mitchell Bell was committed during the commission of the murder of Judith Bell and vice versa. *See* OCGA § 17-10-30(b)(2). We have held that "mutually supporting aggravating circumstances" are impermissible. *Heidler v. State*, 273 Ga. 54, 65-66(22), 537 S.E.2d 44 (2000); *Wilson v. State*, 250 Ga. 630, 638(9), 300 S.E.2d 640 (1983). Since only one of the jury's findings that one murder was committed during the commission of the other murder may stand, we eliminate the jury's finding as to Mitchell Bell's murder and leave intact the jury's finding as to Judith Bell's murder. *Id.*

c. After setting aside the impermissible portions of the jury's sentencing verdicts, both of the death sentences affirmed in this opinion remain supported by at least one statutory aggravating circumstance. *Id.*; *see also Stringer v. Black*, 503 U.S. 222, 231-32, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). 12. Counsel contends that religious materials prepared by Colwell should not have been presented to the jury and that OCGA § 17-10- 35(c)(1) requires reversal. Colwell himself insisted on placing before the jury the religious materials now complained of by counsel. Accordingly, the issue is waived as a matter of trial court error. Compare *Carruthers v. State*, 272 Ga. 306, 308-11(2), 528 S.E.2d 217 (2000) (reversing death sentence where the State had presented certain religious materials over the defendant's objection). Our review under OCGA § 17-10-35(c)(1) is primarily designed to ensure that neither the State nor outside forces inject improper considerations into death penalty trials, but we also must consider the trial as a whole in order to ensure fundamental fairness and justice. Although Colwell's letters, the photocopied pages from the Bible accompanying his letters, and his testimony explained how certain religious texts supported suicide, the death penalty, and other forms of killing, they also offered the jury the opportunity to more fully understand Colwell's psyche. Considering all of these very unusual circumstances, we conclude that this issue provides no basis for reversal under OCGA § 17-10-35(c)(1).

Furthermore, upon our review of the entire record, we find no other basis to conclude that the two death sentences affirmed in this opinion were imposed under

the influence of passion, prejudice, or any other arbitrary factor. OCGA § 17-10-35(c)(1).

14. Counsel contends that Colwell's death sentences are disproportionate to his crimes. We disagree.

Our proportionality review includes a consideration of both the crime and the defendant. OCGA § 17-10-35(c)(3). We consider any relevant information, including mental and social factors. *See Corn v. State*, 240 Ga. 130, 141(III)(2)(c), 240 S.E.2d 694 (1977) ("low mental level and social maladjustment"). Although we accept that Colwell suffers from mental illness, we find nothing in the record to suggest he was incapable of perceiving right and wrong or of understanding the horrible consequences of his actions. The fact that he is plagued with a desire to commit suicide does not take away from the fact that he decided to serve that desire by committing two murders. It is for the means by which he chose to serve his own desire to die that he has been sentenced.

We have held the following:

> It is the reaction of the sentencer to the evidence before it which concerns this court and which defines the limits which sentencers in past cases have tolerated, whether before or after *Furman v. Georgia* [, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)]. When a reaction is substantially out of line with reactions of prior sentencers, then this court must set aside the death penalty as excessive.

Ross v. State, 233 Ga. 361, 366-67(2), 211 S.E.2d 356 (1974); *see also Gissendaner*, 272 Ga. at 716-17(19)(a), 532

S.E.2d 677. Given the merciless and calculated nature of these two murders, the jury's reaction was not excessive.

Considering both the crimes and the defendant, the death penalties affirmed in this opinion were neither excessive nor disproportionate to the penalties imposed in similar cases in Georgia. OCGA § 17-10-35(c)(3). The cases appearing in the Appendix support this conclusion in that each involved a calculated plan to murder or the murder of more than one person.

Judgment affirmed in part and vacated in part.

All the Justices concur, except SEARS, J., who dissents to Divisions 6 and 7 and to the affirmance of the death penalty insofar as it requires death by electrocution.

APPENDIX

Esposito v. State, 273 Ga. 183, 538 S.E.2d 55 (2000); *Heidler v. State*, 273 Ga. 54, 537 S.E.2d 44 (2000); *Gissendaner v. State*, 272 Ga. 704, 532 S.E.2d 677 (2000); *Morrow v. State*, 272 Ga. 691, 532 S.E.2d 78 (2000); *Pace v. State*, 271 Ga. 829, 524 S.E.2d 490 (1999); *Gulley v. State*, 271 Ga. 337, 519 S.E.2d 655 (1999); *Palmer v. State*, 271 Ga. 234, 517 S.E.2d 502 (1999); *Cook v. State*, 270 Ga. 820, 514 S.E.2d 657 (1999); *Mize v. State*, 269 Ga. 646, 501 S.E.2d 219 (1998); *Jenkins v. State*, 269 Ga. 282, 498 S.E.2d 502 (1998); *DeYoung v. State*, 268 Ga. 780, 493 S.E.2d 157 (1997); *Raulerson v. State*, 268 Ga. 623, 491 S.E.2d 791 (1997); *McMichen v. State*, 265 Ga. 598, 458 S.E.2d 833 (1995); *Ferrell v. State*, 261 Ga. 115, 401 S.E.2d 741 (1991); *Stripling v. State*, 261 Ga. 1, 401 S.E.2d 500 (1991); *Gary v. State*, 260

Ga. 38, 389 S.E.2d 218 (1990); *Isaacs v. State*, 259 Ga. 717, 386 S.E.2d 316 (1989); *Ford v. State*, 257 Ga. 461, 360 S.E.2d 258 (1987); *Childs v. State*, 257 Ga. 243, 357 S.E.2d 48 (1987); *Romine v. State*, 256 Ga. 521, 350 S.E.2d 446 (1986); *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986); *Rivers v. State*, 250 Ga. 288, 303, 298 S.E.2d 10 (1982); *Waters v. State*, 248 Ga. 355, 283 S.E.2d 238 (1981); *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308 (1976).

SEARS, Justice, concurring in part and dissenting in part.

I concur in the majority's findings that the trial court correctly entered judgment on appellant's guilty pleas, and that the evidence presented at the sentencing hearing authorized the jury to find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. However, due to the concerns I expressed in my partial dissent to *Wilson v. The State*,[1] I dissent to Divisions 6 and 7 of the majority opinion and to the majority opinion's affirmance of the death penalty only to the extent that it requires death by electrocution.

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[1] 271 Ga. 811, 525 S.E.2d 339 (1999).